



October 22, 2002

Mr. Jesús Toscano, Jr.  
Administrative Assistant City Attorney  
Office of the City Attorney  
City of Dallas  
1500 Marilla Street, 7DN  
Dallas, Texas 75201

OR2002-5969

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171006.

The City of Dallas (the "city") received four requests for information relating to a certain deceased city employee, including information pertaining to the employee's life insurance policy and the employee's personnel file. You state that you have released some of the requested information to one of the requestors. You further state that the city does not possess the pay stubs specified in the third request. The Public Information Act (the "Act") applies only to information in existence at the time the governmental body receives the request for information. *See* Open Records Decision Nos. 452 at 2-3 (1986) (document is not within the purview of the Act if, when a governmental body receives a request for it, it does not exist), 342 at 3 (1982) (Act applies only to information in existence, and does not require the governmental body to prepare new information). Accordingly, we do not address the required public disclosure of the requested pay stubs. You claim that portions of the submitted information are excepted from disclosure under sections 552.101, 552.117, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We must first address the city's obligations under section 552.301. Pursuant to section 552.301(b), a governmental body must ask the attorney general for an opinion and state the applicable exceptions not later than the tenth business day after receiving the written request for information. Additionally, pursuant to section 552.301(e), a governmental body that

receives an open records request for information that it wishes to withhold under one of the exceptions to public disclosure is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which part of the documents. The city failed to ask the attorney general for an opinion within ten business days after receiving the request for information. Further, the city failed to timely submit to this office written comments stating the city's reasons for claiming an exception to disclosure, a copy of the written request for information, evidence showing the city's receipt of the request, and a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which part of the documents. Thus, the city has not complied with section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. Of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.-Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a compelling reason sufficient to overcome the section 552.302 presumption of openness exists only where the information is confidential by law or its release implicates third party interests. *See, e.g.*, Open Records Decision No. 150 (1977). As section 552.101 can provide a compelling reason to overcome the presumption of openness, we will consider your argument under that exception.

Before we consider your argument, however, we note that you have submitted information pertaining to a city employee other than the employee specified by the requests. This ruling does not address the required public disclosure of that information, which we have marked for your benefit.

We turn now to your arguments. You claim that some of the submitted information is private under section 552.101 in conjunction with common-law privacy. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses the common-law right to privacy. Information is protected under the common-law right to privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685.

The right of privacy, however, is purely personal and lapses upon death. *See Moore v. Charles B. Pierce Film Enters. Inc.*, 589 S.W.2d 489 (Tex. Civ. App.--Texarkana 1979, writ ref'd n.r.e.); *see also* Attorney General Opinions JM-229 (1984); H-917 (1976). We therefore conclude that the deceased individual's privacy right in the records has lapsed and so the records may not be withheld on the basis of protecting the deceased individual's privacy.

On the other hand, if the release of information about a deceased person reveals highly intimate or embarrassing information about living persons, the information must be withheld under the common law privacy. *See* Attorney General Opinion JM-229. The beneficiaries have a common-law right of privacy in the financial information. *See* Open Records Decision No. 373 at 3. To the extent these records reveal the identity of a currently designated beneficiary, however, that identifying information must be withheld pursuant to common-law privacy to protect the beneficiary's privacy interests. We note that section 552.023 provides an individual or an individual's personal representative a right to information about that individual when the information is protected by laws intended to protect the individual's privacy. *See* Gov't Code § 552.023. Accordingly, to the extent the requestors represent individuals possessing special rights of access to the requested information under section 552.023, that information must be released to those requestors.

We note that the submitted information includes a W-4 Form. Section 6103(a) of title 26 of the United States Code renders tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. 26 U.S.C. 6103(b)(2). This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Our office has specifically held that W-4 Forms must be withheld in their entirety. Open Records Decision No. 600 at 9 (1992). Therefore, the city must withhold the W-4 Form from the requestor based on section 552.101 in conjunction with section 6103(b)(2).

You argue that some of the city employee's information is excepted from disclosure under section 552.117. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Section 552.117 information pertaining to a deceased individual who is a former official or employee of a governmental body is protected under section 552.117(1), the coverage of which includes "current and former" officials or employees who request that their information be kept confidential under section 552.024. Because the deceased employee made an election under section 552.024 to keep his home address, home telephone number, social security number, and family member information confidential, the city must withhold this information from the requestors. We have marked the information covered by this exception.

You next assert that the submitted documents contain information that is excepted from disclosure under section 552.130 of the Government Code. Section 552.130 of the Government Code excepts from public disclosure information relating to a driver's license issued by an agency of this state. However, section 552.130 is designed to protect the privacy interests of third parties, and the common-law right to privacy expires upon death. Attorney General Opinion H-917 at 3-4 (1976); Open Records Decision No. 272 at 1 (1981). Therefore, the driver's license number of the deceased city employee is not excepted from disclosure under section 552.130.

Finally, we note that the submitted information includes the deceased employee's personnel identification number for an account at the City Employees Credit Union. Section 552.136 provides that, "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained for or by a governmental body is confidential." Gov't Code § 552.136(b). This provision was enacted to protect the privacy of an individual, and therefore, the protection extinguishes upon the individual's death. This conclusion is consistent with prior decisions of this office, which held that exceptions in the Act that only protect a person's privacy interest do not survive the death of that person. See Attorney General Opinion H-917 (1976)(common-law privacy under sections 552.101 and 552.102 lapses on person's death); Open Records Decision Nos. 536 (1989)(section 552.119 does not except peace officer's photograph after officer's death); 524 (1989) (section 552.114 does not except student records after student's death). However, to the extent the account contains community property or is a joint account, the person or persons who share any interest in the account may have a privacy interest in the account number. Thus, pursuant to section 552.136, the city must withhold the personnel identification number if the account at the City Employees Credit Union was jointly owned by the deceased and a person who is a joint holder of the account. Otherwise, the city must release this information. As we base our decision on section 552.136, we need not address your arguments for this information under section 552.101.

Finally, we note that this decision only addresses whether the requested information is subject to required public disclosure under the Act. It does not address whether any requestor is entitled to received the requested information as a representative of a next of kin and likely beneficiary of the benefits payable on behalf of the deceased employee or as a representative of the personal representative of the deceased employee's estate.

In summary, the city must withhold the information that reveals the identity of a currently designated beneficiaries under section 552.101 in conjunction with common-law privacy. Section 552.023 provides an individual or an individual's personal representative a right to information about that individual when the information is protected by laws intended to protect the individual's privacy. A W-4 Form must be withheld under section 552.101 on conjunction with section 6103(a) of title 26 of the United States Code. Personnel information which we have marked is excepted from disclosure under section 552.117(1). Finally, a personnel identification number must be withheld from disclosure to the extent that

this number is used to access an account that was jointly owned by the deceased and another individual. Otherwise, the city must release the personnel identification number to the requestors. The city must release the remaining information to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel  
Assistant Attorney General  
Open Records Division

VGS/sdk

Ref: ID# 171006

Enc: Submitted documents

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(w/o enclosures)